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No. 91-1523

In the Supreme Court of the United States

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ET AL., PETITIONERS

v.

SHANNON CARTER, A MINOR, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether, after determining that petitioners failed to meet their statutory obligation under the Individuals with Disabilities Education Act (IDEA or the Act), 20 U.S.C. 1400 *et seq.* (1988 & Supp II 1990), to provide respondent Shannon Carter with a "free appropriate public education," the district court had authority to order petitioners to reimburse respondent for the costs of Shannon's education in a private school, chosen by her parents, that did not "meet the standards of the State educational agency" under Section 1401(a)(18)(B) of the Act, but that did provide Shannon with an "appropriate" education.

2. Whether the court of appeals correctly determined that petitioners failed to meet their responsibility under the IDEA to provide respondent Shannon Carter with a "free appropriate public education."

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In the Individuals With Disabilities Education Act (IDEA or the Act), 20 U.S.C. 1400 *et seq.* (1988 & Supp. II 1990), Congress sought to assure the availability to all disabled children of "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. 1400(c). Congress sought to "assist States and localities to provide for the education of all children with disabilities," *ibid.*, by

offering financial assistance to States in exchange for the States' agreement to comply with the federal statutory standards and procedures. 20 U.S.C. 1411-1415, 1420.

In order to qualify for federal financial assistance under IDEA, a State must demonstrate that it "has in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. 1412(1). That policy must be reflected in a state plan, approved by the Secretary of Education, that describes the goals, programs, and timetables under which the State intends to educate children with disabilities within its jurisdiction. 20 U.S.C. 1412, 1413.[1] At the local level, IDEA requires the pertinent public education authority to prepare, and review annually, an "individualized education program" (IEP) for each disabled child. 20 U.S.C. 1401(a)(20), 1414(a)(5). As this Court has noted, the IEP is the "centerpiece of [IDEA's] education delivery system for disabled children." *Honig* v. *Doe*, 484 U.S. 305, 311 (1987). The IEP describes the individualized instruction and services that will be provided to the disabled child, and sets goals for educational achievement. 20 U.S.C. 1401(a)(18) and (20), 1414(a)(5).[2]

[1] Among other things, the State must demonstrate that, "to the maximum extent appropriate," it will educate children with disabilities "with children who are not disabled," unless "the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. 1412(5)(B). This is known as the "mainstreaming" requirement.

[2] An IEP is developed jointly by school personnel, the parents of the disabled child, and, where appropriate, the child himself. The IEP ordinarily includes a statement of the child's present levels of educational performance, the annual educational goals (including short term instructional objectives), the specific educational services to be provided, and the criteria and evaluation procedures for determining, on an annual basis, whether instructional objectives are being achieved. 20 U.S.C. 1401(a)(20). The local education agency must provide for yearly review of the IEP, and must make appropriate revisions in the plan if necessary. 20 U.S.C. 1414(a)(5).

In addition to establishing detailed requirements for the IEP, IDEA also grants parents or guardians of children with disabilities certain procedural rights with regard to decisions concerning the child's education, including the right to examine relevant records, the right to a hearing before the local educational agency and review of the agency's decision by the State, and the right to challenge the State's decision in a civil action in either state or federal court.

2. In 1982 and 1983, respondent Shannon Carter was a student in the seventh grade at the Timmonsville public school operated by petitioner Florence County School District Four.[3] As a result of poor performance, Shannon was tested twice by the school district in 1983 for potential learning disabilities. The school district concluded that Shannon's test results at that time did not qualify her as a learning disabled student. Pet. App. 3a, 24a.

In 1984, Shannon's continued poor performance in the ninth grade prompted her parents to seek additional testing from the school district. Based on tests conducted in April 1985, the school psychologist concluded that Shannon exhibited a "serious learning disability" under South Carolina State Department of Education criteria. Pet. App. 4a, 25a. On May 1, 1985, school personnel and Shannon's parents held a meeting to formulate an individualized education program (IEP) for Shannon. The school district proposed that Shannon remain in regular classes but spend at least two hours daily in the "resource room." Shannon's parents objected to this plan because it would require Shannon to attend a special education class alongside emotionally ill and mentally retarded students. Instead, her parents proposed an "itinerant" program under which Shannon would remain in regular classes but

[3] After attending Timmonsville Elementary School for the first grade, Shannon apparently attended the Roy Hudgens Academy, a private school, for grades two through six. Pet. App. 3a, 23a.

receive individualized instruction for three periods per week. An IEP was prepared based on this placement, was signed by the school district and Shannon's parents, and became effective on May 2, 1985. The IEP established goals in reading and mathematics of four months' progress for the school year. *Id.* at 4a-5a, 26a-27a.

Dissatisfied with the IEP, Shannon's parents requested a hearing to challenge the school district's educational program.[4] On August 20, 1985, a hearing was held by a local educational hearing officer, who concluded that petitioners were "providing an adequate academic program" for Shannon. Pet. App. 44a-54a. On October 14, 1985, this conclusion was upheld on review by the state Department of Education. *Id.* at 40a-43a. In the meantime, Shannon's parents decided that Shannon should be placed at the Trident Academy in Mt. Pleasant, South Carolina, a private academy specializing in the education of learning disabled children. Shannon began courses at Trident in September 1985 and ultimately graduated from that institution in the spring of 1988. *Id.* at 5a, 28a. Trident is fully accredited by the Southern Association of Colleges and Schools. Shannon's parents, however, did not seek approval for Shannon's placement at Trident from the South Carolina Department of Education. *Ibid.*

3. In July 1986, Shannon's parents filed this suit on her behalf, claiming that petitioners breached their duty under IDEA to provide Shannon with a "free appropriate public education." Pet. App. 6a. See 20 U.S.C. 1412, 1401(a)(18). The complaint also sought reimbursement for tuition and other costs incurred at Trident under this Court's

[4] The district court commented that, although Shannon's parents signed the IEP, they clearly "were not satisfied with the plan." It found that, since an IEP "is not a binding contract," and can be challenged by the parents at any time, the fact that the parents signed the document was irrelevant to the dispute concerning the adequacy of the IEP. Pet. App. 27a.

decision in *School Committee of the Town of Burlington* v. *Department of Educ.*, 471 U.S. 359 (1985) (*Burlington*). After a three-day bench trial, the district court ruled that the school district had violated IDEA. Pet. App. 20a-39a. Although the court found "no serious procedural non-compliance [with the Act] on the part of the school district," *id.* at 34a-35a, it concluded that the school district had failed "to provide Shannon Carter with a free appropriate public education." *Id.* at 36a. The court determined that the school district's "offer of only three periods of itinerant study per week failed to meet Shannon's educational needs" and that the achievement goals set by the IEP "were wholly inadequate" since, even if Shannon met them, she would "continue to fall behind her classmates at an alarming rate." *Id.* at 27a, 36a.

The district court also found that, "[a]lthough [Trident Academy] did not comply with all of the procedures outlined in [IDEA],"[5] the school "provided Shannon an excellent education in substantial compliance with all the substantive requirements" of the statute. Pet. App. 37a.[6]

[5] The court did not elaborate on the "procedures" with which Trident failed to comply. However, the court elsewhere noted that the school had "not been approved by the South Carolina State Department of Education" as an appropriate placement for handicapped children, Pet. App. 37a, and that it would not likely be eligible for approval because it failed to meet the state requirement that it employ only certified teachers. *Id.* at 28a. See also *id.* at 11a (court of appeals' observation that Trident "does not, for example, develop education plans called IEPs," as the Act requires, and that it employs "at least two faculty members" who are not "certified by the state."); *id.* at 62a-71a (South Carolina regulations setting forth educational requirements for certification of teachers of disabled children).

[6] The court stated that Trident "evaluated Shannon quarterly, not yearly, as mandated by the [Act], it provided Shannon with low teacher-student ratios, and it developed a plan which allowed Shannon to receive passing marks and progress from grade to grade." Pet. App. 37a. The court also noted the findings of its own expert, Dr. Richard Nagle, who tested Shannon and found that she had "made significant

The court rejected petitioners' argument that the school district could not be ordered to pay tuition reimbursement because the school in which Shannon's parents placed her "had not been approved by the South Carolina State Department of Education." *Ibid.* The court observed that "[t]his case involves a situation where the school district failed to provide the child with a free appropriate public education, and the only way the parents could provide the same to their daughter within a meaningful time frame was to enroll her in a private school." *Id.* at 38a. The court concluded that "[n]othing in the existing law or regulations" imposes the "stringent requirements advanced by [petitioners]" as a precondition to reimbursement for parents' unilateral placement under these circumstances. *Ibid.* The court awarded respondent $35,716.11 in reimbursement for costs incurred in connection with Shannon's education at Trident, together with prejudgment interest. *Id.* at 21a, 29a-32a, 39a.

4. The court of appeals affirmed. Pet. App. 1a-19a. Observing that the IEP's goal of "four months progress over a period of more than one year was rather modest" and "failed to satisfy the Act's requirement of more than minimal or trivial progress," the court of appeals upheld the district court's determination that the school district failed to provide Shannon with a free appropriate public education under the Act. *Id.* at 7a-8a.

The court also upheld the district court's order of reimbursement, rejecting petitioners' argument that reimbursement is authorized under the statute "only when parents place their child in a private school approved by

progress at Trident." *Id.* at 29a, 37a. The court observed that "Shannon entered Trident Academy in the fall term of 1985 as a functional illiterate." *Id.* at 25a. Dr. Nagle found that, during Shannon's time at Trident, "her reading comprehension had risen from a level of 4.7 in 1985 to 7.8 in 1988." *Id.* at 29a.

the state." Pet. App. 12a. The court noted that, although Trident's "educational program in many ways parallels" the Act's requirements, Trident "does not attempt to comply with the terms of [IDEA]."[7] *Id.* at 11a. It held, however, that this was not "fatal to the request for reimbursement." *Id.* at 11a, 12a. The court observed that the Act's remedial provision—which authorizes the court to "grant such relief as [it] determines is appropriate," 20 U.S.C. 1415(e)(2)—is a "broad grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives." Pet. App. 18a; *id.* at 10a. It noted further that the requirement in Section 1413(a)(4)(B) "that private schools receiving funds under the Act meet state educational standards" applies "only when the child is placed in the private school by the state or local school system." Pet. App. 13a. The court concluded that "the Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases." *Ibid.*

The court recognized that the Second Circuit had taken a contrary view in *Tucker* v. *Bay Shore Union Free School District*, 873 F.2d 563 (2d Cir. 1989). Pet. App. 15a-17a. The *Tucker* court relied on the definition of "free appropriate public education" in the Act, see Section 1401(a)(18)(B), and on the Court's statement in *Burlington*, 471 U.S. at 369, that reimbursement is appropriate only if "the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." Pet. App. 15a. The court "decline[d] to follow the *Tucker* decision," however, concluding that this Court in *Burlington* did not intend "to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state." *Id.* at 16a.

[7] See note 5, *supra*.

Relying on *Board of Educ.* v. *Rowley*, 458 U.S. 176, 207 (1982), the court of appeals held that, "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.'" Pet. App. 17a. The court noted that petitioners did not dispute the district court's conclusion that "Trident Academy provided Shannon with an appropriate education, which is a prerequisite to reimbursement under *Burlington*." *Id.* at 10a n.2. The court explained that "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." *Id.* at 18a.[8] Thus, the court concluded, the Act does not "forbid[] reimbursement when parents place their child in a private school that has not been approved by the state." *Id.* at 17a.

ARGUMENT

Petitioners present two issues for review. They contend that the lower courts erred in concluding that they failed to meet their responsibility under IDEA to provide Shannon Carter with a "free appropriate public education." We disagree. In our view, the lower courts correctly applied this Court's decision in *Board of Educ.* v.

[8] The court noted that "parents who unilaterally place their child in an unapproved private school bear substantial risks," including the risk that the IEP offered by the public school will be found adequate or that the private school chosen by the parents will fail to provide an appropriate education—i.e., one "reasonably calculated to enable the child to receive educational benefits." Pet. App. 17a, 18a-19a (quoting *Rowley*, 458 U.S. at 207). In either case, the panel noted, "the parents cannot receive reimbursement, whether or not the private school in question is state approved." Pet. App. 18a-19a.

Rowley, 458 U.S. 176 (1982), in deciding that the IEP proposed by petitioner school board did not meet statutory requirements. We do not, in any event, believe that that fact-specific question merits this Court's review.

Petitioners also contend that, in the event of a default of a State's obligations under IDEA, courts lack authority to award reimbursement to parents for the costs of an eligible child's education in a private institution that does not meet the standards of the state educational agency under Section 1401(a)(18)(B). Relying on the district court's factual findings, the court of appeals agreed that Shannon's educational program at Trident Academy was "appropriate" under the Act, in the sense that it was reasonably calculated to enable her to receive educational benefits. See *Rowley*, 458 U.S. at 206-207. Petitioners have not directly challenged that conclusion here. Thus, the question for decision is whether the Act permits courts to order reimbursement for the costs of an appropriate private placement that does not meet formal standards established by the State for the education of the disabled. In our view, the statute does not forbid courts from ordering reimbursement in these circumstances, and the court of appeals was correct to uphold the order of reimbursement in this case. We do not agree with petitioners, however, that review of the reimbursement issue is necessarily warranted in this case. Although the courts of appeals disagree in their interpretation of the statutory provisions governing the scope of relief available under the Act when parents place their children in private schools, that disagreement has arisen in divergent factual settings. Because the Court could decide this case on narrow grounds without definitively resolving the issue of statutory construction on which the courts of appeals conflict, it would be appropriate for the Court to decline review in this case. Alternatively, since the courts of appeals have acknowledged a conflict in their reasoning,

the Court may properly conclude that it should address the reimbursement issue at this time.

1. The courts below correctly concluded that the IEP proposed by the school district failed to provide Shannon with an "appropriate" education within the meaning of the Act. The inquiry in a suit challenging a State's compliance with the requirements of IDEA is twofold. First, the court must determine whether the State complied with the procedures set forth in the Act; second, the court must decide whether the IEP developed through IDEA's procedures is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-207.

In suits challenging educational placements, the Act specifically authorizes district courts to "receive the records of the administrative proceedings," to "hear additional evidence at the request of a party," and to "grant such relief as the court determines is appropriate" based upon "the preponderance of the evidence." 20 U.S.C. 1415(e)(2). In *Rowley*, this Court held that the courts' task under this provision is to make "independent decision[s] based on a preponderance of the evidence," but that the requirement that the record of the state administrative proceedings be filed with the court "carries with it the implied requirement that due weight shall be given to those proceedings." 458 U.S. at 205-206.[9]

In this case, the district court agreed that "there exists no single substantive standard describing exactly how much educational benefit is sufficient to satisfy [IDEA]." Pet. App. 35a. However, since the IEP proposed by petitioners would have left Shannon, to a large extent, "in the regular classrooms of [the] public school system," the

[9] The Court in *Rowley*, 458 U.S. at 205, rejected the argument that courts have "no power to review the substance of the state program," noting that Congress declined to incorporate proposed language "that would have made state administrative findings conclusive if supported by substantial evidence."

district court focused on an "important factor" identified in *Rowley* for evaluating educational progress of disabled children that have been "mainstreamed" in public schools: whether the student has received "an individualized program that would allow her to receive passing marks and advance from grade to grade." Pet. App. 35a-36a (quoting *Rowley*, 458 U.S. at 207 n.28); see also *id.* at 204. The district court noted that the IEP's goal of four months' educational progress over an entire school year guaranteed that Shannon "would continue to fall behind her classmates at an alarming rate." Pet. App. 36a. In addition, the court determined, based on the testimony of various experts, that the goals set in the IEP were "wholly inadequate" for Shannon. *Id.* at 27a. The court found that "three periods of itinerant study a week [proposed in the IEP] failed to meet Shannon's educational needs," *id.* at 36a, and that "Shannon was in need of an intensive self-contained [learning disabled] environment," *id.* at 27a, in order to make progress that would be adequate under the Act. Based on these findings, the court held that the IEP proposed by petitioners "did not provide Shannon with a free appropriate public education as required by [the Act]." *Id.* at 36a. The court of appeals affirmed this conclusion as not "clearly erroneous." *Id.* at 8a.

These conclusions are fully consistent with *Rowley*. In light of the record in this case and the district court's findings, the court of appeals' decision cannot properly be read as establishing the rate of advancement from grade to grade proposed in the IEP as the sole criterion for the adequacy of an educational program under the Act. See Pet. 23. Although the district court found that the plan's educational goals were too modest, that was not the only basis for its conclusion that the IEP did not satisfy the Act's minimum standards. Rather, the court determined that the proposal for three special education sessions per

week fell short of meeting Shannon's basic educational needs, and that Shannon required placement in an "intensive self-contained [learning disabled] environment" in order to make even minimally acceptable progress. Pet. App. 27a. In effect, the district court concluded that, in light of Shannon's individual needs and abilities, the plan proposed by petitioners was not "reasonably calculated" to enable her to receive the degree of educational benefit that would satisfy the Act's requirements. See *Rowley*, 458 U.S. at 206-207. Because the decision on this question merely involves the application of established legal standards to the facts of this case, it does not merit review.

2. a. The district court did not exceed its remedial authority under the statute by ordering tuition reimbursement for Shannon's education at Trident, even though the school did not "meet the standards of the State educational agency." 20 U.S.C. 1401(a)(18)(B). Congress authorized the federal courts to "grant such relief [for violations of the Act] as the court determines is appropriate," 20 U.S.C. 1415(e)(2). As this Court recognized in *Burlington*, 471 U.S. at 369, that provision "confers broad discretion on the court." When, as here, the statute grants broad authority to remedy a statutory violation, the courts may award any remedy that "is compatible with sound and established equitable principles," *Hall* v. *Cole*, 412 U.S. 1, 12 (1973), and is calculated to advance the statutory purpose. *Porter* v. *Warner Co.*, 328 U.S. 395, 400 (1946); see also *California* v. *American Stores Co.*, 495 U.S. 271, 295 (1990). Cf. *Franklin* v. *Gwinnett County Public Schools*, 112 S.Ct. 1028, 1032, 1034-1035 (1992).

This Court considered the scope of courts' remedial powers under IDEA in *Burlington* v. *Department of Educ.*, 471 U.S. 359 (1985), in which it held that the statute permits a court to award tuition reimbursement for the cost of a private education chosen by the parents if the

education offered by the local school board fails to meet the Act's requirements. In *Burlington*, the parents of the disabled child withdrew him from the public school system and placed him in a private school that was generally authorized for such placements by the State. 471 U.S. at 362-363. Because the State had not approved the particular change in placement, however, the school district contended that the placement violated Section 1415(e)(3) of IDEA—which requires retention of the child "in the then current educational placement" unless "the State or local educational agency and the parents * * * otherwise agree"—and that, as a result, the parents' right to reimbursement was forfeited. This Court rejected the argument. It reasoned that, if the parents' failure to procure the educational agency's agreement to a change in placement, in apparent violation of Section 1415(e)(3), is held to cut off parental rights to reimbursement in the event of the State's default, "the principal purpose of the Act will in many cases be defeated in the same way as if reimbursement were never available." That is because school officials who disagree with parents concerning the adequacy of the current educational placement are unlikely to "agree to an interim private school placement while the review process runs its course." 471 U.S. at 372. As a result,

> the parents are forced to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement. The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.

Ibid.

In this case, in contrast with *Burlington*, 471 U.S. at 362-363, the private school in which the parents placed Shannon was not approved by the State and did not meet state educational standards. If tuition reimbursement were barred unless a school met state educational standards, however, Shannon's parents would be faced with an untenable choice like the one posed in *Burlington*: that of procuring an appropriate education for their disabled child only at the cost of forgoing a free one. As respondent points out, Br. in Opp. 23-24, South Carolina does not have a process by which private schools can obtain general state approval for programs for disabled children. Nor is there any other apparent mechanism by which parents can ascertain whether a private school, even if not directly approved by the State, meets "the standards of the State educational agency" under Section 1401(a)(18)(B). See Br. in Opp. 22-24 (citing S.C. Code Regs. § 43-243E (1982)).[10] In practice, then, Shannon's parents would be unable to verify that a private school met state standards; they therefore could not guarantee that an alternative private placement satisfied that proposed prerequisite for reimbursement.

In this situation, it would defeat the remedial purposes of the Act to deny reimbursement for the costs of providing an "appropriate" education when the State has defaulted on its statutory obligation to do so. In this setting, no less than in *Burlington*, the parents' right to obtain a free, appropriate education for their child would be held hostage to the state or local agency's willingness to cooperate in the parents' efforts to find an alternative

[10] IDEA permits States or local educational agencies to fulfill their obligations under the Act by placing disabled students in private educational institutions in lieu of public schools. See Section 1413(a)(4)(B). It is only in this setting that the South Carolina regulations implementing IDEA provide for state evaluation and approval of a private school for the placement of a disabled child. See Br. in Opp. 22-23 (quoting S.C. Code Regs. § 43-243E (1982)).

placement for their child. As suggested in *Burlington*, however, the state educational agency cannot be expected to assist parents in their effort to reject the educational program that the agency has proposed by helping them to assess a private school's compliance with "voluminous" state and statutory requirements. See Br. in Opp. 24.[11]

Petitioners argue (Pet. 12-21) that, since their obligation is to provide Shannon with a "free appropriate public education" under IDEA, they cannot be required to pay for

[11] Indeed, where the parents and school officials disagree over the need for an alternative placement, it is unlikely that the parents can guarantee that their child's private school education would meet all the definitional elements of a "free appropriate public education" under Section 1401(a)(18). For example, Subsection (a)(18)(A) requires that a "free appropriate public education" be provided "under public supervision and direction," and Subsection (a)(18)(D) requires that it be provided "in conformity with the individualized education program required under section 1414(a)(5)." The statute requires that the IEP be formulated jointly by the school, parents, and the "local educational agency." 20 U.S.C. 1401(a)(20). In addition, the agency or "intermediate educational unit" must "establish or revise" the IEP at least "annually," 20 U.S.C. 1414(a)(5), 1401(a)(18)(D). Thus, petitioners would make parents responsible for the private school's production of a detailed educational plan in cooperation with, and under the supervision of, the local educational agency, and for the agency's periodic review and revision of such a plan. See Pet. 15-16 (acknowledging that, in order to be eligible for tuition reimbursement, parents must show that the private education conforms to Section 1401(a)(18)(D)). However, as this Court recognized in *Burlington*, 471 U.S. at 372, state and local education officials who disagree with parents over the placement of a disabled child are unlikely to provide "supervision and direction" over the education of that child in the private institution chosen by the parents or to participate in annual revisions to that child's IEP. These considerations corroborate our view (see pages 15-16, *infra*) that it is the state or local educational agency, and not the parents, that must satisfy the various elements of Section 1401(a)(18). See, *e.g.*, 20 U.S.C. 1412(4) (*State* must provide assurances that the *local educational agency or unit* will establish and periodically review and revise IEP that meets statutory requirements).

Shannon's education at an institution that does not meet the criteria set forth in Section 1401(a)(18)(B), which defines a "free appropriate public education" as, *inter alia*, one that "meet[s] the standards of the State educational agency." We disagree. Since it is the State—and not the disabled child's parents—that must provide a free appropriate public education, it follows that it is the State, and not the parents, that must ensure that the standards in Section 1401(a)(18)(B) of the Act are met. This conclusion is confirmed by Section 1413(a)(4)(B) of the Act, which states that, when a State places a disabled child in a private facility "as the means of carrying out the requirements of this [statute]," the State must determine whether the facility meets "standards that apply to State and local educational agencies." The statute places no parallel obligation on parents who elect to enroll their children in a private school pending the outcome of their challenge to the State's educational plan. In sum, since parents are under no statutory obligation to ensure that their child's education meets the specific standards in Section 1401(a)(18)(B), they cannot be barred from obtaining relief that would otherwise vindicate the Act solely because of failure to comply with those standards.

We thus agree with the courts below that neither lack of state approval of a private school for placement of children under IDEA, nor the school's failure to qualify for such approval, constitutes, in itself, a bar to an award to parents of tuition reimbursement. The rationale underlying *Burlington*'s holding is that parents who "elect to risk shouldering the costs of what they perceive to be a more appropriate placement, and whose judgment is * * * vindicated by the district court, should receive more than an 'empty victory.'" *Alamo Hgts. Ind. Sch. Dist.* v. *State Bd. of Educ.*, 790 F.2d 1153, 1161 (5th Cir. 1986) (citing *Burlington*, 471 U.S. at 370). In this case, Shannon's parents have been vindicated in their judgment that the

placement offered by petitioners was inadequate, and in their belief that the private school placement they chose would provide an appropriate education for their child. Petitioners do not challenge the district court's conclusion that Trident Academy provided Shannon with "an appropriate education"—one that was "in substantial compliance with all the substantive requirements" of IDEA—which is a prerequisite to reimbursement under *Burlington*, 471 U.S. at 369, 373-374. See Pet. App. 29a, 37a, 10a n.2; Br. in Opp. 14-15; Pet. Reply Br. 5. In the circumstances of this case, the award of tuition reimbursement is necessary "to make good the wrong done." *Franklin* v. *Gwinnett County Public Schools*, 112 S.Ct. at 1033 (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). If that award is barred, respondent will have received an "empty victory"—a result contrary to the congressional intent that this Court has recognized.[12]

b. Petitioners claim (Pet. 17) that the court of appeals' decision upholding the remedy in this case is in square

[12] That is not to say, however, that such reimbursement is required in every case of a State's default under IDEA. In *Burlington*, 471 U.S. at 374, the Court indicated that "equitable considerations are relevant in fashioning relief" to parents requesting reimbursement under the Act. In our view, a court may take into account such factors as the overall reasonableness of the parties' conduct (cooperativeness, good faith, efforts to comply with the statute and regulations, procedural errors) and the parents' efforts to cooperate with the State in choosing an appropriate private placement (including whether parents arbitrarily reject placement in schools approved by the State in favor of an institution, for example, that is considerably more expensive than the state-approved schools, or that provides significantly more elaborate services than the statute requires the State to provide). See, *e.g.*, *Tucker* v. *Bay Shore Union Free School Dist.*, 873 F.2d 563, 568 (2d Cir. 1989); *Alamo Hgts. Ind. Sch. Dist.*, 790 F.2d at 1161; *Town of Burlington* v. *Department of Educ.*, 736 F.2d 773, 801-802 (1st Cir. 1984), aff'd, 471 U.S. 359, 374 (1985); *Carrington* v. *Commissioner of Education*, 404 Mass. 290, 297 (1989). In this case, the equitable factors, on balance, favor relief for respondent.

conflict with the Second Circuit's decision in *Tucker* v. *Bay Shore Union Free School Dist.*, 873 F.2d 563 (2d Cir. 1989). Because the court of appeals' analysis in this case is inconsistent with the reasoning, but not necessarily with the result, in *Tucker*, there is no need for the Court to review the reimbursement issue at this time.

In *Tucker*, parents dissatisfied with a school district's proposed plan for educating their disabled child enrolled the child in a private school. The court of appeals upheld the district court's determination that the school district had defaulted on its obligation to provide a "free appropriate public education" under IDEA, and that the parents' alternative private placement was "appropriate to meet [the child's] educational needs." 873 F.2d at 564. The district court refused to award the parents reimbursement for the cost of the private school, however, because the institution was "not on the state's 'approved list' of private schools eligible to contract with the state for the education of [the] handicapped." *Id.* at 566. The court of appeals upheld the denial of reimbursement. The "basis for this result," the court explained, is IDEA's "requirement that handicapped children be educated at public expense only in those private schools that meet [s]tate educational standards." *Id.* at 568 (citing Section 1401(a)(18)(B)).[13] The court concluded, contrary to the court of appeals' reasoning in this case, that the statute "does not empower the district court to award reimbursement" to parents unless the private placement "meet[s] the standards of the State educational agency." 873 F.2d at 568.

Although the *Tucker* court indicated that the obstacle to the award of tuition reimbursement in that case was the

[13] The court noted that the private school's unapproved status "was at least in part the consequence of its unwillingness to follow the state approved curriculum or to admit emotionally disturbed students," as the State required. 873 F.2d at 564 n.1.

private school's failure to meet state educational standards under Section 1401(a)(18)(B) (which requirement the court below refused to impose as a prerequisite to reimbursement), the Second Circuit had no occasion to decide whether a different result would obtain if, as in this case, the State maintained no list of approved private schools and did not otherwise provide a mechanism for obtaining approval or verifying compliance with state standards. Likewise the court of appeals in this case did not confront the issue of whether a court could deny reimbursement for tuition expenses incurred at a private school chosen by parents that did not meet state standards if the parents had available to them a list of schools approved by the State. Although the court of appeals in this case suggested that reimbursement would not necessarily be barred in those circumstances, it did not rule out the possibility that, in a particular case, a court could deny reimbursement on equitable grounds to parents who decline to enroll their child in an approved school. See note 12, *supra*.

Because this case and *Tucker* sharply diverge on the facts, this Court could decide the reimbursement issue in this case without definitively resolving the question of statutory construction on which the courts of appeals disagree. That consideration counsels hesitation in granting review in this case. Nevertheless, because the court of appeals itself acknowledged (Pet. App. 15a-16a) that its decision is in conflict with *Tucker* on the underlying issue of the scope of statutory authority to grant reimbursement, the Court may wish to address the issue at this time.

CONCLUSION

The petition for a writ of certiorari may appropriately be denied. Alternatively, if the Court determines to grant certiorari, it should be limited to question 1.

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